IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-877

ABRAM CHEATHEM, JR., HAZEL CHEATHEM,
Petitioners,

v.

THE CITY OF EVANSVILLE, INDIANA, Acting by the Evansville, Indiana Redevelopment Commission,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Indiana

QUESTIONS PRESENTED

The Respondent disagrees with the petitioners' statement of the questions presented. The only question presented is whether or not the petitioners' Amended Complaint stated a claim under Indiana law and procedure.

ARGUMENT

Respondent opposes the Petition for a Writ of Certiorari on the following grounds:

1. The Decision of the Indiana Court of Appeals Was Based on Non-Federal Grounds.

The Court of Appeals in its opinion stated "we agree with the trial court that Cheathems 'Amended Complaint' in its present form fails to state a claim upon which relief can be based." Thus, the holding of the Court was specifically on non-federal grounds as to whether the Cheathems had presented a claim under procedural rules of the Supreme Court of Indiana.

Counsel for petitioners was well aware that the Court of Appeals could decide his case on non-federal grounds. In the Brief of Appellants filed by Petitioners with the Appellate Court of Indiana (now the Indiana Court of Appeals) they stated the following:

> "Plaintiffs are aware that Rule AP 8.3(A)(2) does not require such a statement as this one in an appeal to the Appellate Court. However, they believe an explanation of why they have brought their appeal here may be useful to this Court. This appeal involves several constitutional questions and may appear, at first impression, to be within the jurisdiction of the Supreme Court. **Burns Indiana Statutes**, Sec. 4-214. However, authority exists which dictates that if the merits of a case can be reached without deciding a constitutional question, the courts of Indiana will do so. **Shaw v. Union Trust Co.** (1922), 192 Ind. 410, 136 N.E. 571." (Brief of Appellants, p. 5)

This Court is presented with a case which involves a Petition for a Writ of Certiorari from a judgment of the

Court of Appeals of Indiana where transferred to the Supreme Court of Indiana was denied without opinion (S.A.-2). Where, from an absence of an opinion expressed by the highest Court of Appeal, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the Federal questions, or upon such Federal questions, both being in the case, the Supreme Court will not take jurisdiction. **Cuyahoga River Power Co. v. Northern Realty Co.** (1917), 244 U.S. 300, 37 S.Ct. 643, 61 L.Ed. 1153.

This Court has held in **Ellis v. Dixon** (1955), 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231, that it was without jurisdiction to review a judgment of a state court denying, without stating any ground for a decision, a motion for leave to appeal, where the Supreme Court itself could not decide on the vague and empty record the constitutional issues tendered. By the same token, the state court was entirely justified in refusing to pass on them, and, consequently, its denial of leave to appeal rested on an adequate non-federal ground.

Petitioners had a remedy under state law which they chose not to exercise. They could have amended their complaint. The Court of Appeals said:

> "When we say that no question of fact will be determined upon a motion to dismiss and that the complaint needs only state enough to enable the defendant to form a responsive pleading, we do not mean that the elements necessary to give the defendants notice of the recovery theory can be excluded. The detailed pleading of facts under the old code pleading has been dispensed with but not the disclosure by the claimant of the theory upon which his claim is based. Cheathem has the burden to state all of the necessary elements of his theory of recovery. It is not the trial court's duty to search for all possible legal theories

which may or may not apply to the statements advanced by the plaintiff in his claim when a motion to dismiss has been made. In the present case, Cheathem has refused to plead further and he is bound by what he has chosen to include in his claim." (A-6)

2. **No Constitutional Question Is Presented.**

In their Petition to Transfer to the Indiana Supreme Court the petitioners alleged four grounds or errors in the Court of Appeals' Opinion. Two grounds were that the Court of Appeals' opinion contravened ruling precedents of the Supreme Court of Indiana. Another ground was whether or not one was entitled to moving and relocation expenses. The fourth ground was that the Court of Appeals erroneously decided that the petitioners were not entitled to damages for violation of constitutional rights. This issue was never raised in the trial court or raised in the Court of Appeals. (See petitioners' Brief filed with the Court of Appeals). Even assuming that the issue was properly presented there is no authority to support the contention. The case cited by petitioners is **Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics** (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619. **Bivens** granted a right to bring an action against federal agents for an unconstitutional search. No such issue is presented here.

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be denied.

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February 9, 1973